



FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

40 CFR Chapter IX

[FPISC Case 2018-001; Docket No. 2018-0008; Sequence No. 1]

RIN 3090-AJ88

**Fees for Governance, Oversight, and Processing of
Environmental Reviews and Authorizations by the
Federal Permitting Improvement Steering Council**

AGENCY: Federal Permitting Improvement Steering Council.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking proposes to establish an initiation fee for project sponsors to reimburse the Federal Permitting Improvement Steering Council - Office of the Executive Director (FPISC-OED) for reasonable costs to implement certain requirements and authorities required under Title 41 of the Fixing America's Surface Transportation Act (FAST-41) and costs of operating FPISC-OED. FAST-41 creates a new authority to establish a fee structure to reimburse reasonable costs incurred in implementing certain requirements and authorities including the costs to agencies and the costs of operating the Permitting Council. In this rulemaking, we propose an initiation fee that would cover only reasonable costs for FPISC-OED's operations and costs to provide oversight and

support to implement FAST-41. We seek comments on all aspects of the proposed rulemaking.

DATES: We will accept comments, data, and information regarding this proposed rule no later than **[INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit comments in response to FPISC Case 2018-001 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "FPISC Case 2018-001", under the heading "Enter Keyword or ID" and select "Search". Select the link "Submit a Comment" that corresponds with "FPISC Case 2018-001" and follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "FPISC Case 2018-001" on your attached document.
- Mail: FPISC-OED, c/o General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Lois Mandell, 1800 F Street, NW, Washington, DC 20405.

Instructions: Please submit comments only and cite FPISC Case 2018-001 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check

www.regulations.gov approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Amber Levofsky, Federal Permitting Improvement Steering Council - Office of the Executive Director, 1800 F Street NW, Washington, DC 20504; telephone number: 202-412-2064; email address: amber.levofsky@fpisc.gov.

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I. Background

Title 41 of the Fixing America's Surface Transportation Act (Pub. L. No. 114-94, secs. 41001 et seq. (Dec. 4, 2015) (codified at 42 U.S.C. 4370m et seq.)) (FAST-41) seeks to encourage greater coordination across the Federal Government in environmental reviews and authorizations for large, complex infrastructure projects. To oversee its implementation, FAST-41 created the Federal Permitting Improvement Steering Council (FPISC or Permitting Council), which is chaired by an Executive Director appointed by the President and consists of Deputy Secretary-level members from 14 Federal agencies, the Council on Environmental Quality (CEQ), and the Office of Management and Budget (OMB) (42 U.S.C. 4370m-1). The 14 Federal agencies include 13 agencies designated in FAST-41 as enacted (42 U.S.C. 4370m-1(b)(2)(B)), as well as the General Services Administration (GSA), which was invited to join the Permitting Council by the Executive Director pursuant to 42 U.S.C. 4370m-1(b)(2)(B)(xiv) on May 2, 2017. In addition, GSA was designated by the OMB Director to provide administrative support for the Executive Director and, as reasonably necessary, provide support and staff to enable the Executive Director to fulfill the duties of the position, effective March 1, 2016 (42 U.S.C. 4370m-1(d)). GSA's membership in the Permitting Council and its role in

providing administrative support to the Permitting Council establish the basis for GSA to assist the FPISC with this proposal (The term "we" as used in this document refers to the Permitting Council).

To become a new covered project under FAST-41, the project sponsor must submit a complete FAST-41 initiation notice (FIN) and send it to the facilitating agency, as designated in the OMB and CEQ Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects (FAST-41 Implementation Guidance, published January 13, 2017) at <https://www.permits.performance.gov/tools/fast-41-implementation-guidance>, and the Executive Director. However, project sponsors have the option to engage and consult with potential lead, participating, and cooperating agencies (as defined in 42 U.S.C. 4370m) early in the project lifecycle, before they submit a FIN. FPISC-OED facilitates many of these consultations and discusses with the project sponsor the various considerations that project sponsors may take into account when determining whether and when to submit a FIN. For example, FPISC-OED will ensure the project sponsor knows who the facilitating agency would be for the project, the best approach in moving forward if there is a formalized pre-application process already in

place, and an understanding of eligibility under FAST-41. For additional information on the requirements for a project to become covered under FAST-41 and the coordination recommended for project sponsors interested in submitting a FIN, see the FAST-41 Implementation Guidance.

If a FIN is approved and the project becomes a covered project under FAST-41, FPISC-OED supports the relevant Federal agencies and project sponsor during the Federal environmental review and authorization process. This support can include managing the integrity and content of data on the publicly-available Permitting Dashboard regarding schedules for the specific permits during the permitting process, verifying the accuracy of the data on a routine basis, assessing and determining the viability of modifications to schedules after they are posted on the Permitting Dashboard, and handling disputes between Federal agencies or between a project sponsor and a Federal agency related to the schedules (42 U.S.C. 4370m-2(c)(2)). In addition, FPISC-OED facilitates regularly scheduled Permitting Council meetings, consultations with the Department of Transportation (DOT) on Permitting Dashboard management, and meetings with project sponsors regarding project status and any updates related to agency coordination.

The duties of the Executive Director include, but are not limited to:

- Developing, in consultation with the Permitting Council, "recommended performance schedules, including intermediate and final completion dates, for environmental reviews and authorizations most commonly required for each category of covered projects" (42 U.S.C. 4370m-1(c)(1)(C));
- Recommending, in consultation with the Permitting Council, to the Director of OMB or to CEQ, guidance for agencies to carry out the responsibilities of FAST-41 (42 U.S.C. 4370m-1(c)(1)(D));
- Coordinating with the Permitting Council to issue yearly recommendations on best practices for the categories outlined in 42 U.S.C. 4370m-1(c)(2)(B);
- Coordinating with the Permitting Council to meet annually with groups or individuals representing State, tribal, and local governments that are engaged in the infrastructure permitting process (42 U.S.C. 4370m-1(c)(2)(C));
- Reviewing and approving any modifications of more than 30 days to the permitting schedule of covered projects to prevent undue delays and ensure a realistic and

concurrent-upon schedule has been developed, upon which all parties will act moving forward (42 U.S.C. 4370m-2(c)(2)(D)(i)(III)); and

- Mediating disputes between project sponsors and relevant agencies related to the permitting timetable. If no conclusions are made after a total of 60 days, the Office of Management and Budget will make a final decision (42 U.S.C. 4370m-2(c)(2)(C)).

This document proposes to establish a required initiation fee for project sponsors to reimburse FPISC-OED for reasonable costs to implement the requirements and authorities mentioned above under FAST-41 and costs of operating FPISC-OED. The fee is necessary because as an oversight council, FPISC-OED is responsible for implementing the provisions of FAST-41 by facilitating and institutionalizing the transparency, accountability, and coordination among Federal agencies related to the Federal environmental review and authorization process. The fee allows FPISC-OED to carry out its obligations to improve the infrastructure permitting process.

II. Authority

Pursuant to 42 U.S.C. 4370m-8(a), the heads of Permitting Council agencies, with the guidance of the Director of OMB and in consultation with the Executive

Director, may issue regulations establishing a fee structure to recover, from project sponsors, reasonable costs incurred in conducting environmental reviews and authorizations for infrastructure projects covered by FAST-41. Reasonable costs include costs to implement the requirements and authorities of 42 U.S.C. 4370m-1 and 4370m-2, including (1) the costs to agencies and (2) the costs of operating the Council (42 U.S.C. 4370m-8(b)), which includes FPISC-OED.

III. Discussion

A. Proposed Regulations

i. § 1900.1 Purpose and Scope

FAST-41 established a new governance structure, set of procedures, and authorities to improve the timeliness, predictability, and transparency of the Federal environmental review and authorization process for covered infrastructure projects. Section 1900.1 of this proposed regulation would restate the statutory requirement and introduce the purpose of the proposed requirements. Section 1900.1 also would set the rule's effective date (i.e., the date on which project sponsors would have to comply with the rule).

We propose the effective date to be one day following publication of a final rule because we estimate that

project sponsors will take only 2.5 hours to familiarize themselves with the rule, complete the FIN, and ensure that their accounting system(s) can transfer the appropriate initiation fee with the FIN. FAST-41 was signed into law in December 2015; since then, seven projects have submitted FINs and gone through the process of becoming covered projects. We request comment on the effective date of the proposed rule and whether the proposed effective date would provide project sponsors sufficient time to adequately comply with the regulations.

ii. § 1900.2 Definitions

Section 1900.2 would define key terms used throughout the proposed regulations, many of which were derived from FAST-41, with modifications where further clarification was needed. We propose to adopt the same definition of the following terms as they are defined in 42 U.S.C. 4370m: "Agency," "Covered project," "Executive Director," "Facilitating agency," "Lead agency," "NEPA," and "Project sponsor." In addition, we propose to add the following terms that have not been defined in FAST-41 to provide clarity for the regulations:

- (a) Business day. We propose that the term "business day" means Monday through Friday and excludes Federal legal holidays.

- (b) Environmental Review Improvement Fund. We propose that the term "Environmental Review Improvement Fund" refers to the fund described in 42 U.S.C. 4370m-8(d) which must be established in the Treasury of the United States to deposit any fees collected. The amounts available in the Environmental Review and Improvement Fund shall be available to the Executive Director, without appropriation or fiscal year limitation, solely for the purposes of administering, implementing, and enforcing FAST-41, including the expenses of the Council;
- (c) FAST-41. We propose to define the term "FAST-41" to mean Title 41 of the Fixing America's Surface Transportation Act (Pub. L. No. 114-94, 41001 et seq. (Dec. 4, 2015) (codified at 42 U.S.C. 4370m et seq.)) which is the basis for this proposed regulation;
- (d) FAST-41 initiation notice (FIN). We propose to define the term "FAST-41 initiation notice," which is not defined in Title 42 of the United States Code, as a FAST-41 initiation notice of a proposed covered project that a project sponsor submits to FPISC-OED and the facilitating agency;

- (e) FPISC-OED. We propose to define the term "FPISC-OED," which is not defined in Title 42 of the United States Code, as the Federal Permitting Improvement Steering Council-Office of Executive Director that supports the Federal Permitting Improvement Steering Council in implementing the provisions of FAST-41;
- (f) Indian tribe. We propose to define the term "Indian tribe," which is not defined in Title 42 of the United States Code, as any Indian tribe, band, nation, or other organized group or community, including any Alaskan Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
- (g) Initiation Fee. We propose to define the term "initiation fee," which is not defined in Title 42 of the United States Code, as a non-refundable payment submitted by a project sponsor. The proposed rule provides more detail on the initiation fee amount and how it will be assessed.

iii. § 1900.3 FAST-41 Initiation Fee

In proposed section 1900.3(a), we propose an initiation fee of \$200,000 per FIN submitted for each project by a project sponsor of a proposed covered project. An explanation of how this amount was determined is discussed in section B.iii of this proposed rule. The initiation fee would be due in two parts - \$5,000 would be due at the time the project sponsor submits the FIN and \$195,000 would be due within 10 business days of a determination that the project is a covered project for purposes of FAST-41. The \$5,000 non-refundable portion was determined through analysis of FPISC-OED's costs incurred on pre-coordination with project sponsors, pre-coordination with lead and cooperating agencies, and FIN review. If the project is determined not to be a covered project, the \$5,000 portion of the initiation fee would not be refunded and the \$195,000 would not be assessed. We determined that 10 business days was an appropriate balance of providing sponsors with sufficient time to prepare the necessary funds and wanting to start providing FPISC-OED services as soon as possible. That being said, we solicit public comment on whether we should consider a different period of time.

In the future, we may need to adjust the amount of the initiation fee based on changes to program costs and the

number of new FINs received. Section 1900.3(b) sets out the mechanism by which the Permitting Council would be able to change the fee. The fee being set in this regulation is based, in part, on the fact that in fiscal year (FY) 2017 FPISC-OED supported 35 covered projects. In the next few years, FPISC-OED anticipates additional projects becoming covered at the beginning of or in the early stages of project implementation. As a result, more coordination may be necessary between FPISC-OED, the Permitting Council agencies, and project sponsors. In addition, FPISC-OED's costs are anticipated to increase based on the number of projects that are accepted as covered projects as a greater number of projects will require additional staff for support. If necessary, FPISC-OED would adjust the fee by developing an average hourly rate for government staff using the number of full time employees multiplied by the salary of each employee (based on the General Schedule classification and pay system), which also includes overhead and operational costs. For contractor support costs, FPISC-OED would use total contract costs divided by full time employees to develop an average hourly rate that also includes salary, overhead, and operational costs. A change in the initiation fee would not change the non-refundable portion of the fee, only the portion due at the

time the project was determined to be a covered project under FAST-41. The regulation would require FPISC to publish the new amount of the initiation fee in the Federal Register before it can take effect. We seek comment on the methodology for calculating the new initiation fee and whether changes to the initiation fee should be made through notification in the Federal Register or whether we should take comment before a revised initiation fee takes effect.

In proposed section 1900.3(c), any Indian tribe proposing covered projects on trust property are exempted from paying the initiation fee. This is consistent with the trust relationship as well as the government-to-government relationship between the Federal Government and federally-recognized Indian tribes, and will enable FPISC-OED to provide services, without additional cost to tribal governments, in order to protect trust assets held for the benefit of Indian tribes.

In addition to Indian tribes, the fee structure allows the Permitting Council to exempt other parties for which the fee would impose an undue financial burden or is otherwise determined to be inappropriate. Therefore, on a case-by-case basis, FPISC-OED would grant exemptions, in whole or in part, to project sponsors demonstrating that

the fee would impose undue financial burden or was otherwise inappropriate. A petition for an exemption would require sufficient supporting evidence to demonstrate that the fee would be economically burdensome or inappropriate. FPISC-OED would consider the following factors in making an exemption determination:

- (a) The nature and cost of the infrastructure project;
- (b) The financial impact of the fee on the project sponsor;
- (c) The financial resources of the project sponsor; and
- (d) The type of operations of the project sponsor.

In proposed section 1900.3(d), the Executive Director would review a project sponsor's petition for an exemption and based on the factors listed above and would either approve or deny the petition for exemption. We are proposing the Executive Director have 30 days to review the petition for exemption and make a written determination. Once a determination is made, the Executive Director will transmit the written determination, including a statement of reasons, to the project sponsor. This proposal solicits public comment on the specific exemptions it is proposing

and on the conditions by which it would review such exemptions.

In proposed section 1900.3(e), as allowed by FAST-41, the initiation fee would be used by FPISC-OED to cover its costs in implementing the requirements and authorities of 42 U.S.C. 4370m-1 and 4370m-2 and the operational costs of FPISC-OED (42 U.S.C. 4370m-8(a)). For example, activities undertaken by FPISC-OED that may be covered by the initiation fee could include, without being limited to, pre-coordination with project sponsors; pre-coordination with lead and cooperating agencies; FIN review; maintenance and enhancements of the Permitting Dashboard including operations, security, and the development and provision of training; outreach to stakeholders through conferences and meetings; producing handouts, flyers, and information materials for project sponsors related to FAST-41; developing recommended performance schedules including intermediate and final completion dates for environmental reviews and authorizations; assisting with development of coordinated project plans (CPPs); reviewing and approving any modifications of more than 30 days to the permitting schedule of covered projects; mediating disputes between projects sponsors and relevant agencies related to the permitting timetable; assessing Permitting Council agency

updates to the CPPs and Permitting Dashboard; tracking compliance with permitting timetable dates; writing reports and implementation guidance; writing standard operating procedures; and conducting Permitting Council, Chief Environmental Review and Permitting Officer (CERPO), and Permitting Council Working Group meetings. The initiation fee would also cover FPISC-OED's costs of operations including, but not limited to, staffing and personnel, office space and equipment, and program support contracts. The proposed initiation fee would have no impact on fee requirements of other Federal agencies under their existing processes and is not intended to be allotted to Permitting Council agencies to facilitate their reviews and/or participation in the FAST-41 process.

In proposed section 1900.3(f), we would ensure that all initiation fees collected were deposited into the Environmental Review and Improvement Fund as required by FAST-41 (42 U.S.C. 4370m-8(d)(1)). Amounts collected under the initiation fee final rule would be available to the Permitting Council Executive Director, without appropriation or fiscal year limitation, for the purpose of administering FAST-41 and operating the FPISC-OED (42 U.S.C. 4370m-8(d)(2)). The use of funds accepted under this fee structure shall not impact impartial decision-making

with respect to environmental reviews or authorizations, either substantively or procedurally, because FPISC-OED does not have any authority in the decision-making with respect to environmental reviews and authorizations (42 U.S.C. 4370m-8(e)). FPISC-OED ensures enhanced coordination, visibility, predictability, and accountability in the environmental review and authorization process. The outcome of the environmental review and authorization process remains with the lead, cooperating, and participating agencies, as applicable, that conduct and issue environmental reviews and authorizations.

B. Economic Impacts

i. Benefits of the Initiation Fee to Project Sponsors of Covered Projects

In considering the potential impacts of the proposed rule, we anticipate that there will be no change in potential benefits associated with this rule. Benefits are not quantified in this analysis. However, the proposed rule is associated with benefits in that it allows for the continuation of the FPISC-OED's services. An initiation fee is necessary because as an oversight council, FPISC-OED is responsible for implementing the provisions of FAST-41 by facilitating and institutionalizing the transparency,

accountability, and coordination among Federal agencies related to the Federal environmental review and authorization process. The fee allows FPISC-OED to carry out its obligations to improve the infrastructure permitting process. Specifically, an initiation fee would allow FPISC to continue to produce the following benefits for projects covered under FAST-41:

- Enhanced coordination: When a proposed project becomes a covered project under FAST-41, the lead or facilitating agency, as applicable, must identify all agencies and governmental entities likely to have financing, environmental reviews, authorizations, or other responsibilities with respect to the covered project, and invite all Federal agencies to become participating or cooperating agencies (42 U.S.C. 4370m-2(a)(2)(A)(ii)). The lead or facilitating agency, as applicable, in consultation with each coordinating and participating agency, shall establish a project-specific CPP for coordinating public and agency participation in, and completion of, any required Federal environmental review and authorization for the project (42 U.S.C. 4370m-2(c)(1)(A)). Advanced coordination has been known to help improve the efficiency of reviews by allowing

early communication of project goals and discussion of potential alternatives with permitting agencies and stakeholders which can lead to environmental reviews and authorizations being completed earlier by identifying and addressing potential causes of delay earlier in the process.

- Enhanced visibility and predictability: The lead agency, within a CPP, will develop a permitting timetable for each covered project, which establishes scheduled dates for all required Federal environmental reviews and authorizations (as well as for State permits and environmental reviews when the State elects to participate in the FAST-41 process) based on project-specific factors, statutory and regulatory requirements, and historical timeframes for the activities. Scheduled and actual timeframes for government processes will be publicly displayed and tracked on the online Permitting Dashboard. If an environmental review or authorization is delayed, the lead, cooperating, or participating agency is required to update the schedule at least 30 days before the currently reported completion date and the agency will not be allowed to extend the final completion date by more than 30 days without consulting with the project

sponsor. The enhanced visibility and predictability leads to greater accountability by Federal agencies. As discussed in the FAST-41 Implementation Guidance, environmental review and authorization schedules for independent regulatory commissions are not subject to review and oversight by project sponsors or other government offices.

- Enhanced accountability: Covered projects benefit from high-level oversight on the permitting process from the Executive Director to ensure that Federal agencies follow FAST-41 processes and adhere to established timeframes. If the lead, participating, or cooperating agencies delay the permitting process by more than 150 percent of the original schedule, it must be reported to Congress (42 U.S.C. 4370m-2(c)(2)(D)(iii)).
- Enhanced public participation: Specific timeframes have been developed for certain public participation activities, including early coordination for collection of key concerns, public involvement in the development of reasonable alternatives, and public comment periods on draft Environmental Impact Statements (EISs). For example, the lead agency must establish a comment period for draft EISs to be between 45 days and 60 days unless the lead agency,

project sponsor, and any cooperating agency agree to a longer deadline or the lead agency, in consultation with each cooperating agency, extends the deadline for good cause (42 U.S.C. 4370m-4(d)(1)).

- Enhanced legal protections: The statute of limitations to challenge any Federal authorizations for covered projects is reduced from 6 years to 2 years from the date the authorization is issued by the agency, and future claims pertaining to a Federal environmental review may be brought only if the commenter filed a sufficiently detailed comment and put the lead agency on notice of the issue during the environmental review process. Persons who did not submit comments on the environmental review would not have any standing to challenge the authorization for a covered project (42 U.S.C. 4370m-6(a)).

ii. Costs of the Initiation Fee to Project Sponsors of Covered Projects

We evaluated potential costs and transfer provisions associated with this rulemaking. Cost provisions include consideration of time associated with rule familiarization for stakeholders and time required to complete the FIN. We concluded that the proposed rule would result in a 10-year total cost of \$20,637 undiscounted, \$18,290 discounted at 3

percent, and \$15,847 discounted at 7 percent. The transfer provision accounts for the non-refundable portion of the initiation fee for all FINs as well as the additional fee required from successful project sponsors. We determined that over a 10-year period, the proposed rule would transfer funds from project sponsors to FPISC totaling \$78,692,000 undiscounted, \$67,963,353 discounted at 3 percent, and \$56,794,754 discounted at 7 percent. The costs of the fee are described in greater detail in section IV.A.ii below.

iii. Determination of Amount of Initiation Fee

The initiation fee amount was determined based on an analysis of current and projected FPISC-OED expenditures, a review of the existing portfolio of covered projects, and estimates of the number of new covered projects that will be added in future years. In FY 2017, FPISC-OED had expenditures of approximately \$4.75 million and supported 35 projects on the Permitting Dashboard. Of those 35 covered projects, 25 were still in progress while 10 were listed as "Complete" at the end of FY 2017. Based on this data, we estimate the FY 2017 cost per FAST-41 covered project was approximately \$190,000 (\$4.75M/25 covered projects still in progress).

It is important to note that most of the initial set of 35 covered projects were existing projects that were already far along in the environmental review and authorization process when FAST-41 was enacted. As new projects are added, we anticipate additional support and coordination will be needed for newly designated covered projects that are in the early stages of development or the environmental review and authorization process. This enhanced level of support includes early coordination and stakeholder outreach, assisting in the development of CPPs and permitting timetables for the entire permitting process, consulting and facilitating throughout the Federal environmental review and authorization process, and monitoring and assessing Federal agency performance in meeting Federal permitting timetable goals. We estimated that the proposed \$200,000 initiation fee per project for project sponsors is sufficient for FPISC-OED to fully carry out its responsibilities under FAST-41, including the additional level of support and coordination needed for newly designated covered projects.

At the beginning of FY 2018, FPISC-OED was overseeing 37 covered projects. Based on estimates of the number of projects that would be completed each year and the number of new covered projects each year, we estimate that FPISC-

OED will support 24 new covered projects in FY 2019; 26 new covered projects in FY 2020; 33 new covered projects in FY 2021; 41 new covered projects in FY 2022; and 48 new covered projects each year in FY 2023-2028. Therefore, the annual fee collected would range from \$4.80 million in FY 2019 to \$9.60 million by FY 2023. This estimate comes from the anticipated increase in visibility of the program from projects successfully going through the FAST-41 process. In addition, we anticipate that by FY 2023 the number of new projects will stay steady at 48 new projects a year because there are a limited number of projects in the country that would be eligible to be covered under FAST-41. Furthermore, FPISC-OED anticipates not all eligible projects will apply to become covered projects.

The analysis assumes a 5 percent charge to provide a reserve fund for the program. OMB established Circular A-25 (User Charges), which promulgated Federal policy regarding the self-sufficiency of all projects.¹ A central goal of OMB Circular A-25 guidelines is to efficiently allocate government resources by at least fully recouping all costs associated with providing the good or service. OMB Circular

¹ The guidelines were issued under the authority granted by Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 1111) and Executive Orders No. 8248 and 11541. Available at <https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-025.pdf>.

A-25 guidelines state that all recipients of special benefits from Federal activities will be assessed a fee for services beyond those received by the general public. If existing laws restrict such a fee, agencies will review activities periodically and recommend legislative changes as appropriate. User fees will be collected in advance or at the time of the provision of service. When possible, agencies should set charges as rates rather than fixed amounts. Both direct and indirect costs will be included in the calculation of total costs, including salaries and fringe benefits, travel, general overhead, consulting fees, and insurance, among other cost elements.

Public demand for such services varies from year to year. This variation creates challenges because agencies seek to recover the costs of managing programs and the associated services provided to recipients. For this reason, many agencies maintain reserve funds to ensure that sufficient agency funding is available for the continued operation of the agency. In Federal User Fees: A Design Guide, the Government Accountability Office (GAO) recommended that maintaining reserve funds can help hedge against sudden or temporary fluctuations in demand and the

corresponding costs of operations.² As such, we included a reserve fund fee to provide program stability year to year.

The proposed initiation fee would not apply to covered projects that were already identified under FAST-41 and posted to the Permitting Dashboard prior to the effective date of this rule. The effective date would be one day after publication of the final rule. We propose the effective date because it estimates that project sponsors would take only 2.5 hours to familiarize themselves with the rule, complete the FIN, and ensure that their accounting system(s) can transfer the appropriate initiation fee with the FIN. For FY 2019 and beyond, we may reassess the amount of the initiation fee based on early program implementation experience and the number of FINs submitted by project sponsors for proposed covered projects, and to adequately cover the reasonable costs of FPISC-OED.

In addition, FAST-41 places a limit on the fee structure that requires the fee to "be established in a manner that ensures that the aggregate amount of fees collected for a fiscal year is estimated not to exceed 20 percent of the total estimated costs for the fiscal year

² Federal User Fees: A Design Guide, GAO-08-386SP, May 2008. Available at: <http://www.gao.gov/new.items/d08386sp.pdf>.

for the resources allocated for the conduct of environmental reviews and authorizations covered by this subchapter, as determined by the Director of the Office of Management and Budget" (42 U.S.C. 4370m-8(c)(3)).

Therefore, the total estimated costs for the fiscal year for the conduct of environmental reviews and authorizations covered by the subchapter was calculated by adding the cost for all environmental reviews under the National Environmental Policy Act (NEPA), all authorizations³ for projects that likely would have been covered under FAST-41, and FPISC-OED costs. Based on CEQ estimates on the average costs of completing EISs (\$250,000 to \$2 million) and the number of final EISs (FEISs) that were published (162), the cost for environmental reviews under NEPA was estimated to be approximately \$182.25 million in FY 2014.⁴

- Environmental reviews costs (low range): Number of FEISs Published in FY 2014 * Low Range for Average Cost of EIS = 162 * \$250,000 = \$40.5 million
- Environmental reviews costs (high range): Number of FEISs Published in FY 2014 * High Range for Average

³ As defined in 42 U.S.C. 4370m(3) authorizations "means any license, permit, approval, finding, determination, or other administrative decision issued by an agency that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of a covered project administered by a Federal agency or, in the case of a State that chooses to participate in the environmental review and authorization process in accordance with [42 U.S.C. 4370m-2(c)(3)(A)], a State agency."

⁴ The NEPA Task Force Report to Council on Environmental Quality: *Modernizing NEPA Implementation* (Sept. 2003) at pp. 65-66.

Cost of EIS = 162 *\$2 million = \$324 million

- Average cost: (High range + Low range) / 2 = (\$40.5 million + \$324 million) / 2 = \$182.25 million

The data for the cost of authorizations for covered projects under FAST-41 is derived from an OMB data call to the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of Energy, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of the Interior, the Department of Transportation, the Environmental Protection Agency, the Advisory Council on Historic Preservation, and the U.S. Army Corps of Engineers on August 19, 2014 regarding agencies' budgets for infrastructure permitting and review and other existing agency authorities for financing infrastructure permitting activities. The data collected from agencies is current as of August 17, 2015. The average cost in FY 2014 for authorizations for projects that likely would have been covered under FAST-41 was estimated to be approximately \$106.33 million. In addition, the costs for FPISC-OED in FY 2017 were \$4.75 million. FY 2017 numbers were used to estimate FPISC-OED costs since the office was not in existence in FY 2014. Therefore, the aggregate amount of fees collected for a fiscal year could not exceed \$58.67 million (20 percent of \$293.33 million).

We estimate that FPISC-OED will have 24 new projects in FY 2019 and by FY 2023 there will be 48 new projects.

Therefore, in FY 2019 the aggregate amount of fees collected by FPISC-OED would be \$4.80 million ($\$200,000 \times 24$ new projects) and by FY 2023 the aggregate amount of fees collected by FPISC-OED would be \$9.60 million ($\$200,000 \times 48$ new projects). Thus, the aggregate amount of fees would be far less than the 20 percent limit of \$58.67 million.

We request comments on the calculation of the proposed initiation fee and proposed calculation of future initiation fees.

C. Issues on which the Permitting Council Seek Comment

Although we welcome comment on any aspect of this proposal, FPISC is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. Initiation Fee Non-Refundable and Due in Two Parts:

The proposal to have the initiation fee be non-refundable and paid in two parts - \$5,000 of the fee at the time the project sponsor submits the FIN, and then \$195,000 within 10 business days of the Federal facilitating or lead agency's determination, the Executive Director's final determination, or the

Council's opinion that the project is a covered project under FAST-41.

2. Calculation of Initiation Fee: The methodology and assumptions of the calculation of the initiation fee as discussed in III.B.iii.

3. Exclusions: The exclusions to the initiation fee as discussed in section III.A.iii.

D. PUBLIC PARTICIPATION: We will accept comments, data, and information regarding this proposed rule no later than the date provided in the DATES section. Interested parties may submit comments using any of the methods described in the ADDRESSES section.

1. Submitting Comments via Regulations.gov: The regulations.gov web page will require you to provide your name and contact information. Your contact information will be viewable to FPISC-OED and GSA staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, FPISC-OED and GSA will use this information to contact you. If FPISC-OED and GSA cannot read your comment due to technical difficulties and cannot contact you for

clarification, we may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section below.

FPISC-OED and GSA processes submissions made through regulations.gov before posting. Normally,

comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

2. Submitting Comments via Email or Mail: Comments and documents submitted via email, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, e-mail address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to FPISC-OED and GSA. Email submissions are preferred. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted electronically should be provided in PDF (preferred), Microsoft Word, or Excel file format. Provide documents that are not secured, written in English, and are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

(a) Campaign Form Letters: Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

(b) Confidential Business Information: Any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the

information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. We will make our own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to us when evaluating requests to treat submitted information as confidential include: (1) A description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is generally known by or available from other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

It is our policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. DOCKET: The docket is available for review at <http://www.regulations.gov> and includes Federal Register notices, public comments, and other supporting documents and materials. All documents in the docket are listed in the regulations.gov index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure. A link to the docket Web page can be found at: <https://www.permits.performance.gov/tools/notice-proposed-rule-making-permitting-council-fast-41-initiation-user-fee>. This Web page contains a link to the docket for this proposed rule on the regulations.gov site. The regulations.gov Web page also contains instructions on how to access all documents, including public comments, in the docket.

IV. Regulatory Review

**A. Executive Order 12866: Regulatory Planning and Review,
and Executive Order 13563: Improving Regulation and
Regulatory Review**

This rule is a "significant regulatory action" under Executive Order 12866 so it was submitted to OMB for review.

We evaluated the potential costs and benefits that could result from this rulemaking. As presented in Table 1, we estimate that the proposed rule would result in a 10-year total cost of \$20,637 undiscounted, \$18,290 discounted at 3 percent, and \$15,847 discounted at 7 percent. On an annualized basis, the proposed rule would result in a cost of \$2,064 undiscounted, \$2,144 discounted at 3 percent, and \$2,256 discounted at 7 percent. The transfer provision accounts for the non-refundable portion of the initiation fee for all FINs as well as the additional fee required from successful project sponsors. We determined that over a 10-year period, the proposed rule will transfer funds from project sponsors to FPISC-OED totaling \$78.692 million undiscounted, \$67.963 million discounted at 3 percent, and \$56.795 million discounted at 7 percent. On an annualized basis, the transfer provision amounts to \$7.869 million undiscounted, \$7.967 million discounted at 3 percent, and \$8.086 million discounted at 7 percent. Although we were

unable to quantify benefits directly attributable to the fee, we do understand that there are significant benefits from FPISC-OED's services and the fee will allow the program to continue in future years. We invite comments from the public on how to estimate these benefits.

i. Scope and Key Inputs to the Analysis

We estimated that rule familiarization would occur only during the first year of the analysis period and would require familiarization by a manager and by an environmental engineer. When determining the initiation fee, we assumed there would be 48 projects whose sponsors would submit FINs each year. While we expect the program to reach this level over time, fewer than 48 FINs are expected for the first few years as the program ramps up and expands. For the purposes of this analysis, we estimate that 24 FINs will be received from project sponsors in FY 2019, 26 FINs will be received in FY 2020, 33 FINs will be received in FY 2021, 41 FINs will be received in FY 2022, and 48 FINs will be received each year in FY 2023 through FY 2028.

We evaluated changes in the opportunity cost of time for project sponsors and other stakeholders using wage rates to represent the value of managers' or engineers' time that, in the absence of the rule, would not have been

spent on rule familiarization or completing FINs to gather fee amounts. This analysis uses wage rates for General and Operations Managers (occupation code 11-1021) in the Utilities sector (North American Industry Classification System code 22) as well as wage rates for Environmental Engineers (occupation code 17-2081) in the Utilities sector (NAICS code 22). The source for wages is the median hourly wage data (May 2016) from the U.S. Department of Labor (DOL), Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES).⁵ The BLS does not publish data on fringe benefits for specific occupations, but it does for the broad industry groups in its Employer Costs for Employee Compensation (ECEC) release. This analysis uses an hourly wage of \$58.16 for managers and an hourly wage of \$41.10 for environmental engineers. For private industry, benefits account for 30.4 percent of employer costs,⁶ while the remaining 69.6 percent of employer costs are directed towards salary. Therefore, we applied a loaded wage rate factor of 1.44 to account for total costs to employers (inclusive of benefits) when calculating cost associated

⁵ U.S. Department of Labor (DOL), Bureau of Labor Statistics (BLS). Occupational Employment Statistics (OES). National Industry-Specific Occupational Employment and Wage Estimates. May 2016. Available at: https://www.bls.gov/oes/current/naics2_22.htm#11-0000 (accessed February 8, 2018).

⁶ U.S. Department of Labor, Bureau of Labor Statistics (BLS). Employer Costs for Employee Compensation - September 2017. December 15, 2017. <https://www.bls.gov/news.release/pdf/ecec.pdf> (accessed February 16, 2018).

with rule familiarization and application completion $(1.44 = 1 + 30.9/69.6)$.

ii. Costs

Rule familiarization is expected to require one hour of a manager's time and one hour of an environmental engineer's time for each project sponsor or other interested stakeholder. Because 24 FINs are expected in FY 2019, and because rule familiarization only takes place in FY 2019, the proposed rule will require a total of 24 hours of managers' time and 24 hours of environmental engineers' time at the appropriate wage rates (as discussed in the "Scope and Key Inputs to the Analysis" section of this proposed rule). Therefore, over the 10-year analysis period, the only costs associated with rule familiarization occur in FY 2019 and amount to \$3,423 $(24 \text{ projects} \times (1 \text{ hour of time required for manager's familiarization} \times \$58.16 \text{ wage for manager} \times 1.44 \text{ loaded wage rate factor}) + (1 \text{ hour of time required for environmental engineer's familiarization} \times \$41.10 \text{ wage for environmental engineer} \times 1.44 \text{ loaded wage rate factor}))$.

There are also costs associated with the additional time required for project sponsors to complete the FIN as a result of the changes introduced by this proposed rule, namely gathering an initiation fee. We estimate that

program sponsors in each year will require 0.5 hours of a manager's time at the appropriate wage rate (as discussed in the "Scope and Key Inputs to the Analysis" section of this proposed rule) as a result of the new FIN elements. We expect the number of FINs to reach 48 by FY 2023, but expect fewer than 48 FINs each year between FY 2019 and FY 2022. The 10-year total undiscounted cost of time associated with FIN completion is \$17,214. This is calculated by multiplying the 0.5 hours of managers' time by the associated wage rate (including accounting for the loaded wage rate factor) to get \$41.78 ($= 0.5 \times 1.44 \times \58.16), then multiplying this amount by the number of FINs expected in each year. For the purposes of this analysis, we estimate that 24 FINs will be received from project sponsors in FY 2019, 26 FINs will be received in FY2020, 33 FINs will be received in FY 2021, 41 FINs will be received in FY 2022, and 48 FINs will be received each year in FY 2023 through FY 2028. The total cost across all years is \$17,214.

Table 1 of this proposed rule shows the combined costs of rule familiarization and FIN completion. As presented in Table 1, the proposed rule would result in a 10-year total cost of \$20,637 undiscounted, \$18,290 discounted at 3 percent, and \$15,847 discounted at 7 percent. On an

annualized basis, the proposed rule would result in an undiscounted cost of \$2,064, \$2,144 discounted at 3 percent, and \$2,256 discounted at 7 percent. Rule familiarization costs are assumed to occur only in FY 2019, and therefore are not discounted at either 3 percent or 7 percent. Costs associated with FIN completion occur each year and are discounted.

**Table 1. Summary of the Total Costs of the Proposed
Rule (2016\$)**

| Year | | | | Discounted | |
|---|---------------------------------|---------------------------|---------------------------------------|-----------------------------|-----------------------------|
| | Rule Familiarization | FIN Completion | Total Costs ^(a) | Discounted at 3% | Discounted at 7% |
| 2018 | \$3,423 | \$1,003 | \$4,426 | \$4,426 | \$4,426 |
| 2019 | N/A | \$1,086 | \$1,086 | \$1,055 | \$1,015 |
| 2020 | N/A | \$1,379 | \$1,379 | \$1,300 | \$1,204 |
| 2021 | N/A | \$1,713 | \$1,713 | \$1,568 | \$1,398 |
| 2022 | N/A | \$2,006 | \$2,006 | \$1,782 | \$1,530 |
| 2023 | N/A | \$2,006 | \$2,006 | \$1,782 | \$1,530 |
| 2024 | N/A | \$2,006 | \$2,006 | \$1,782 | \$1,530 |
| 2025 | N/A | \$2,006 | \$2,006 | \$1,782 | \$1,530 |
| 2026 | N/A | \$2,006 | \$2,006 | \$1,782 | \$1,530 |
| 2027 | N/A | \$2,006 | \$2,006 | \$1,782 | \$1,530 |
| Total | \$3,423 | \$17,214 | \$20,637 | \$18,290 | \$15,847 |
| Annualized | | | \$2,064 | \$2,144 | \$2,256 |
| Notes: (a) Total cost values may not equal the sum of the components due to rounding | | | | | |

iii. Benefits

In considering the potential impacts of the proposed rule, we anticipate that there will be no change in potential benefits associated with this rule. Benefits are not quantified in this analysis. However, the proposed rule is associated with benefits in that it allows for the continuation of the FPISC-OED's services. An initiation fee is necessary because as an oversight council, FPISC-OED is responsible for implementing the provisions of FAST-41 by facilitating and institutionalizing the transparency, accountability, and coordination among Federal agencies related to the Federal environmental review and authorization process. The fee allows FPISC-OED to carry out its obligations to improve the infrastructure permitting process. Specifically, an initiation fee would allow FPISC to continue to produce the following benefits for projects found to be "covered" under FAST-41:

- Enhanced coordination: When a proposed project becomes a covered project under FAST-41, the lead or facilitating agency, as applicable, must identify all agencies and governmental entities likely to have financing, environmental reviews, authorizations, or other responsibilities with respect to the covered project, and invite all Federal agencies to become

participating or cooperating agencies (42 U.S.C. 4370m-2(a)(2)(A)(ii)). The lead or facilitating agency, as applicable, in consultation with each coordinating and participating agency, shall establish a project-specific CPP for coordinating public and agency participation in, and completion of, any required Federal environmental review and authorization for the project (42 U.S.C. 4370m-2(c)(1)(A)). Advanced coordination has been known to help improve the efficiency of reviews by allowing early communication of project goals and discussion of potential alternatives with permitting agencies and stakeholders which can lead to environmental reviews and authorizations being completed earlier by identifying and addressing potential causes of delay earlier in the process.

- Enhanced visibility and predictability: The lead agency, within a CPP, will develop a permitting timetable for each covered project, which establishes scheduled dates for all required Federal environmental reviews and authorizations (as well as for State permits and environmental reviews when the State elects to participate in the FAST-41 process) based on project-specific factors, statutory and regulatory

requirements, and historical timeframes for the activities. Scheduled and actual timeframes for government processes will be publicly displayed and tracked on the online Permitting Dashboard. If an environmental review or authorization is delayed, the lead, cooperating, or participating agency is required to update the schedule at least 30 days before the currently reported completion date and the agency will not be allowed to extend the final completion date by more than 30 days without consulting with the project sponsor. The enhanced visibility and predictability leads to greater accountability by Federal agencies. As discussed in the FAST-41 Implementation Guidance, environmental review and authorization schedules for independent regulatory commissions are not subject to review and oversight by project sponsors or other government offices.

- Enhanced accountability: Covered projects benefit from high-level oversight on the permitting process from the Executive Director to ensure that Federal agencies follow FAST-41 processes and adhere to established timeframes. If the lead, participating or cooperating agencies delay the permitting process by more than 150

percent of the original schedule, it must be reported to Congress (42 U.S.C. 4370m-2(c)(2)(D)(iii)).

- Enhanced public participation: Specific timeframes have been developed for certain public participation activities, including early coordination for collection of key concerns, public involvement in the development of reasonable alternatives, and public comment periods on draft EISs. For example, the lead agency must establish a comment period for draft EISs to be between 45 days and 60 days unless the lead agency, project sponsor, and any cooperating agency agree to a longer deadline or the lead agency, in consultation with each cooperating agency, extends the deadline for good cause (42 U.S.C. 4370m-4(d)(i)).
- Enhanced legal protections: The statute of limitations to challenge any Federal authorizations for covered projects is reduced from 6 years to 2 years from the date the authorization is issued by the agency, and future claims pertaining to a Federal environmental review may be brought only if the commenter filed a sufficiently detailed comment and put the lead agency on notice of the issue during the environmental review process. Persons who did not submit comments on the environmental review would not have any standing to

challenge the authorization for a covered project (42 U.S.C. 4370m-6(a)).

B. Paperwork Reduction Act

This rulemaking does not include any information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

This proposed rule establishes a user fee for voluntary use of Permitting Council services for the purposes of streamlining Federal environmental reviews and authorizations for covered infrastructure projects. Entities may still receive Federal environmental reviews and authorizations without the use of Permitting Council services.

This proposed rule may affect up to several dozen entities at any given time. Based on the current list of 37 covered projects in NAICS codes 2211 (Electric power generation, transmission and distribution) and 2212

(Natural gas distribution), approximately one third count as small entities according to Small Business Administration (SBA) size standards. Therefore, this rule will have an impact on a substantial number of small entities. However, this rule will not have a significant economic impact on those entities. The costs of the rule occur across two categories (rule familiarization and application completion) and at most, have an impact of \$185 per firm (\$143 for rule familiarization and \$42 for application completion). The standard threshold for a significant economic impact is considered 1 percent of a firm's revenue. Of the 37 current covered projects, no project sponsor has revenue less than \$42 million.⁷ With rule costs of \$185, these only account for less than 0.0004 percent of revenue ($= 185 / 42,000,000$). Even when considering the fee amount of \$200,000, the rule only accounts for 0.5 percent of revenue. No current or future entity in these NAICS codes likely has revenues such that this amount would constitute an undue burden and furthermore, participation in this program is voluntary and no firm is required to pay the fee discussed in this proposed rulemaking in order to receive a Federal

⁷ Revenue estimates were gathered from publicly available revenue data or project sponsor annual reports.

environmental review or authorization (although other fees may apply based on specific environmental review or authorization and agency requirements).

For the reasons stated above, we certify that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (URMA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector (Pub. L. 104-4, sec. 201 (codified at 2 U.S.C. 1531)). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy (2 U.S.C. 1532(a) and (b)). The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected

officers of State, local, and Tribal governments on a "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. This proposed rule does not contain a Federal intergovernmental or private sector mandate, as those terms are defined in UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, "Federalism," published at 64 FR 43255, on August 4, 1999, imposes certain requirements on agencies formulating and implementing policies and regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and then carefully assess the necessity for such actions. The Executive Order also requires agencies to have a process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. We examined this proposed rule and have determined that, if promulgated, it will not pre-empt State law. This action impacts project sponsors of FAST-41

covered projects. Accordingly, no further action is required by Executive Order 13132.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," published at 65 FR 67249, on Nov. 9, 2000, reaffirms the Federal government's commitment to tribal sovereignty, self-determination, and self-government. Its purpose is to ensure that all agencies consult with the Indian tribes and respect tribal sovereignty as they develop policy on issues that impact Indian communities. This proposed rule will allow a tribal government, or a consortium of tribal governments, to apply as project sponsors for an infrastructure project to become a FAST-41 covered project, and covered projects may be implemented on tribal lands. In addition, a tribal government or a consortium of tribal governments may be asked by a lead agency to become a cooperating or participating agency on a FAST-41 covered project. On November 30, 2017, the Executive Director of the Permitting Council sent letters to 567 federally-recognized tribes requesting consultation on this proposed rule. The Muscogee (CREEK) Nation provided a comment that requested an automatic exemption from the initiation fee for tribal

governments proposing projects on trust property under FAST-41.

The United States government has specific responsibilities to each Tribe based on treaties, statutes, or other sources. Consistent with these responsibilities, the trust relationship, and the government-to-government relationship between the Federal government and federally-recognized tribes, the Federal government often provides services to tribes relating to the protection of trust assets at no cost. Therefore, the proposed rule includes an exemption for tribal grants proposing projects on trust property under FAST-41.

G. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," published at 66 FR 28355 on May 22, 2001, requires Federal agencies to prepare and submit to OMB's Office of Information and Regulatory Affairs (OIRA) a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule or regulation, and that: (1)

Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

We have preliminarily concluded that this regulatory action is not a "significant energy action" because the proposed rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, we have not prepared a Statement of Energy Effects for this proposed rule.

H. National Environmental Policy Act

Each infrastructure project that is covered under FAST-41 requires Federal agencies to render certain decisions. Such Federal agencies are required to adhere to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.) when making those decisions. This rulemaking simply imposes fees on those project sponsors

applying to become a covered project under FAST-41;
therefore, by itself, this rulemaking would not have any
effect on the quality of the environment.

**I. Executive Order 13771: Reducing Regulation and
Controlling Regulatory Costs**

This rule is not expected to be subject to the
requirements of Executive Order 13771, published at 82 FR
9339, on February 3, 2017.

List of Subjects in 40 CFR Part 1900

Administrative practice and procedure, Fees, Reporting
and recordkeeping requirements.

Dated: August 27, 2018.

Angela F. Colamaria
Acting Executive Director
Federal Permitting Improvement Steering Council - Office of
the Executive Director (FPISC-OED)

For the reasons stated in the preamble, under the authority of 42 U.S.C. 4370m et seq., FPISC proposes to add chapter IX to title 40 of the Code of Federal Regulations as set forth below:

CHAPTER IX-FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

PART 1900-COORDINATION OF ENVIRONMENTAL REVIEWS AND

AUTHORIZATIONS - FEES

Subpart A-General

Sec.

1900.1 Purpose and scope.

1900.2 Definitions.

1900.3 Initiation fee.

Subpart B-[Reserved]

Authority: 42 U.S.C. 4370m et seq.

Subpart A-General

§ 1900.1 Purpose and scope.

The purpose of this part is to establish an initiation fee to reimburse the Federal Permitting Improvement Steering Council-Office of the Executive Director (FPISC-OED) for costs incurred in the coordination of environmental reviews and authorizations under Title 41 of the Fixing America's Surface Transportation Act of 2015 (FAST-41) (42 U.S.C. 4370m et seq.). As of [date one day after the publication of the final rule in the Federal Register], any project sponsor submitting a FAST-41

initiation notice must comply with all applicable requirements of this part.

§ 1900.2 Definitions.

As used in this part -

Agency means the same as the term in 5 U.S.C. 551.

Business day means Monday through Friday and excludes Federal legal holidays.

Covered project means the same as the term in 42 U.S.C. 4370m(6).

Environmental Review Improvement Fund means the fund established in the Treasury of the United States to deposit any initiation fees collected by FPISC-OED.

Executive Director means the same as the term in 42 U.S.C. 4370m(12).

Facilitating agency means the same as the term in 42 U.S.C. 4370m(13).

FAST-41 means Title 41 of the Fixing America's Surface Transportation Act, codified at 42 U.S.C. 4370m through 4370m-12.

FAST-41 initiation notice (FIN) means a FAST-41 initiation notice of a proposed covered project that a project sponsor submits to the Federal facilitating or lead agency and FPISC-OED.

FPISC-OED means the Federal Permitting Improvement Steering Council-Office of the Executive Director that supports the Federal Permitting Improvement Steering Council in implementing the provisions of FAST-41.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaskan Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Initiation fee means a non-refundable payment submitted by a project sponsors in two parts: when the sponsor submits a FAST-41 initiation notice, and upon determination that the project is a covered project under FAST-41.

Lead agency means the same as the term in 42 U.S.C. 4370m(15).

NEPA means the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.).

Project sponsor means the same as the term in 42 U.S.C. 4370m(18).

§1900.3 FAST-41 initiation fee.

(a) Initiation fee. A project sponsor shall submit an initiation fee of \$200,000, \$5,000 of which the project sponsor shall pay upon submission of a FIN and \$195,000 of which the project sponsor shall pay within 10 business days of being notified that a project is a covered project.

(b) Adjustment of initiation fee. Each fiscal year, beginning in FY 2019, the FPISC-OED may reassess and adjust the amount of the initiation fee described in paragraph (a) of this section based on program implementation experience and the number of infrastructure projects seeking to become "covered projects" under FAST-41, and to adequately cover reasonable costs of the FPISC-OED. The FPISC-OED will publish this amount in a Federal Register document.

(c) Exemptions. The initiation fee shall be excluded for the following parties:

(1) Indian tribe proposing covered projects on trust property; and

(2) Other parties determined by FPISC-OED, in whole or in part, for which an initiation fee would impose an undue financial burden or is otherwise determined to be inappropriate. A project sponsor must submit a petition for exemption which provides sufficient evidence to demonstrate that the initiation fee would be economically burdensome or

inappropriate. FPISC-OED will consider the following factors in making an exemption determination:

- (i) The nature and cost of the infrastructure project;
- (ii) The financial impact of the initiation fee on the project sponsor;
- (iii) The financial resources of the project sponsor; and
- (iv) The type of operations of the project sponsor.

(d) On or before 30 days from the date that a project sponsor submits a complete petition for exemption, the Executive Director shall decide whether FPISC-OED will approve the petition for exemption based on the factors set forth in paragraph (c) (2) of this section. Upon a determination, the Executive Director shall notify in writing a project sponsor of the determination, including a statement of reasons.

(e) Use of initiation fee. The collected initiation fees will be available to FPISC-OED, without appropriation or fiscal year limitation, solely for the purposes of administering and implementing 42 U.S.C. Chapter 44, Subchapter IV: Federal Permitting Improvement, including the expenses of the Council.

(f) Collection. All fee amounts collected under paragraph (a) of this section will be deposited into the Environmental Review Improvement Fund.

Subpart B-[Reserved]

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